Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Application of	)	
	)	
NEWS CORPORATION AND THE DIRECTV GROUP, INC.	)	
	)	
Transferors,	)	MB Docket No 07-18
	)	
and	)	
	)	
LIBERTY MEDIA CORPORATION	)	
	)	
Transferee,	)	
	)	
For Authority to Transfer Control	)	

LIBERTY MEDIA CORPORATION'S CONSOLIDATED OPPOSITION TO PETITIONS TO DENY AND RESPONSE TO COMMENTS

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SUMMARY

The pending application is predicated upon a transaction that would: (a) substitute Liberty Media Corp. ("Liberty Media") for News Corporation ("News Corp.") as the 38.4 percent owner of DIRECTV; (b) eliminate News Corp.'s ownership interest in and affiliation with DIRECTV; and (c) eliminate Liberty Media's ownership interest in and affiliation with News Corp. Although the proposed transaction unquestionably will reduce media consolidation and vertical integration, Liberty Media offered to accept the conditions that the Commission had imposed upon News Corp. when it approved News Corp.'s acquisition of a *de facto* controlling interest in DIRECTV after an exhaustive analysis just three years ago. Nevertheless, the present petitions to deny and comments request that the Commission either deny the application as contrary to the public interest or impose far *more* restrictive conditions on DIRECTV and Liberty Media post-transaction -- when *neither* will be affiliated with News Corp. -- than the Commission imposed three years ago when *both* were affiliated with News Corp.

The petitioners and commenters provide no factual or legal support for the regulatory "relief" that they request from the Commission in the context of this application proceeding. The petitions to deny filed by EchoStar Satellite L.L.C. ("EchoStar"), Hispanic Information and Telecommunications Network, Inc. ("HITN") and North Dakota Broadcasters ("NDB") are procedurally defective because they do not present specific allegations of fact supported by affidavit, as required by statute and the Commission's rules. Instead, Petitioners provide only self-serving speculation and conjecture or, in the case of EchoStar, offer newspaper articles and quotes from media rivals that are well over a decade old and irrelevant under well-established Commission policies.

In their quest for the imposition of *more* conditions on a transaction that results in *less* consolidation and vertical integration, petitioners and commenters speculate that there must be some ongoing relationship among DIRECTV, News Corp. and Liberty Media concealed in either the "provocatively named" and "suggestive" Ancillary Agreements referenced in the Share Exchange Agreement or the carriage agreements between DIRECTV and programming services affiliated with News Corp. or Liberty Media. However, the Ancillary Agreements have nothing to do with any ongoing ownership, management or other vestigial interest by News Corp. in DIRECTV. Those agreements provide for various services that Liberty Media will require in order to continue the day-to-day operations of the three regional sports networks that it is acquiring as part of the transaction. While Petitioners and Commenters may desire to see copies of DIRECTV's carriage agreements with News Corp. and Liberty Media in order to advance their own commercial interests, they offer no factual or legal justification to warrant production of these agreements in this proceeding.

Several petitioners and commenters also suggest that Liberty Media should be required to "divest" its ownership of Liberty Cablevision of Puerto Rico Ltd. ("LCPR"). Aside from the fact that there are no cable television/DBS cross-ownership restrictions, divestiture in this case would be a meaningless exercise in light of Liberty Media's *de minimis* interest. LCPR is an indirect wholly-owned subsidiary of Liberty Global, Inc. ("Liberty Global"), a separate publicly-traded company. Liberty Media holds shares representing less than 0.10 percent of Liberty Global's voting power. Under the circumstances, divestiture would accomplish nothing. In any event, Liberty Media has suggested in the Transfer Application that Dr. Malone be insulated from decisions regarding LCPR's operations or the operations of DIRECTV Latin America in Puerto Rico. The Commission has recognized such insulation as an appropriate remedy in other proceedings and should use that approach to address any potential issue here.

Finally, like letters to the North Pole in early December, petitioners and commenters identify in their submissions a wide variety of regulatory gifts that each would like to receive in this proceeding -- none of which has any relationship to the Transfer Application. Ranging from "guaranteed carriage" over other programmers, to a ban on exclusive agreements with third party programmers, to even a prohibition on Liberty Media's creation or acquisition of any new programming without prior government approval, these requests are without any factual support and wholly unrelated to the transaction before the Commission. The Commission should grant this application expeditiously and send a clear signal that, where transfer applicants have acted responsibly in addressing at the outset issues potentially arising from their proposed transaction, it will not entertain additional demands from self-interested parties as part of the application process.

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Liberty Media, the proposed transferee in this application for consent to the *de facto* transfer of control ("Transfer Application") of authorizations held by The DIRECTV Group, Inc. ("DTV") and its subsidiaries (collectively "DIRECTV"), submits this consolidated opposition and response to: (a) petitions to deny the Transfer Application filed by EchoStar, HITN and NDB (collectively, "Petitioners"); and (b) comments filed by the American Cable Association ("ACA"), Consumers Union, Consumer Federation of America, Free Press and Media Access Project (collectively "Consumers"), National Association of Broadcasters ("NAB"), National Cable Television Cooperative ("NCTC"), and RCN Telecom Services, Inc. ("RCN") (collectively, "Commenters").[1] The transaction at issue will eliminate the ownership interest of News Corp. in DIRECTV and Liberty Media's ownership interest in News Corp. Although the transaction unquestionably will reduce current levels of media consolidation and vertical integration, the Petitioners and Commenters request that the Commission deny the Transfer Application or impose a wide variety of additional, onerous restrictions on DIRECTV and Liberty Media as conditions of approval. No participant in this proceeding has presented any legal or factual basis for imposing such conditions.

PRELIMINARY STATEMENT

The pending application for authorization to transfer *de facto* control of DIRECTV from News Corp. to Liberty Media seeks Commission approval of a transaction by which News Corp. will divest its interest in DIRECTV, Liberty Media will divest its interest in News Corp., and Liberty Media will replace News Corp. as the 38.4% owner of DIRECTV. In order to address at the outset any competitive concerns that might arise from the transaction, Liberty Media committed in the Transfer Application "to abide by all of the relevant conditions established by the Commission" when News Corp. acquired its interest in DIRECTV three years ago. Transfer Application at 2. Nevertheless, the Petitioners and Commenters now seek a grab bag of additional restrictions on DIRECTV, Liberty Media and even third parties as conditions of Commission approval. The additional restrictions have little to do with the "public interest" and everything to do with the economic self-interests of most Petitioners and Commenters.

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[1] NAB's comments are confined to the issue of DIRECTV's provision of local-into-local service in all 210 television markets in the United States. DIRECTV addresses that issue in its response to the NAB Comments. Likewise, the comments filed by NCTC relate solely to the continued application of the conditions to News Corp., which News Corp. addresses in its response.

A review of the overreaching conditions requested by the Petitioners and Commenters confirms that economic self-interest controls:

(a) HITN seeks "guaranteed carriage" for all "existing channels that are independent of the buyers, sellers, mainstream broadcast or cable outlets," regardless of whether consumers want to receive that programming (HITN Petition at n.14);

(b) EchoStar would ban the acquisition of any exclusive programming by DIRECTV and Liberty Media from third parties and actually suggests that Liberty Media be precluded from acquiring or creating any further programming without prior FCC approval (EchoStar Petition at 21-22, 32);

(c) ACA would change the definition of a small cable operator so that all of its members would qualify, eliminate all volume discounts on programming, extend the notice period for arbitration relating to "must-have" programming, and extend the duration of various conditions from six to ten years (ACA Comments at 11-17); and

d) RCN would prohibit all exclusive programming agreements with third parties for "local, regional and national sports programming" and require DIRECTV to sublicense any "non-duplicable content" so that other MVPDs could use it to "develop their own differentiated programming options" (RCN Comments at 8 n. 21).

The Petitioners and Commenters have offered nothing to support the draconian conditions they advocate. No one has presented any economic data or expert analysis identifying any issues arising from the proposed transaction or justifying the conditions they seek. None of the Petitions satisfies the requirement that there be "specific allegations of fact" supported by affidavits of persons with personal knowledge. Rather, Petitioners and Commenters offer only their own conjecture about Liberty Media's motives for the current transaction and speculation and innuendo from a variety of publications, most of which were published well over a decade ago.

Liberty Media has agreed to accept the conditions that were placed on News Corp. when News Corp. acquired its interest in DIRECTV three years ago, despite the fact that

Liberty Media's interests in other distribution media and in "must-have" broadcast and regional sports network programming pale in comparison to those of News Corp. When the record is viewed objectively, there is no basis for imposition of additional burdensome restrictions that would impede DIRECTV's ability to compete with other MVPDs and Liberty Media's ability to compete with other programmers, solely to advance the interests of Petitioners and Commenters. The imposition of additional restrictions not only is inconsistent with the public interest in the context of this transaction, but also would make clear to future applicants that any willingness to agree at the outset to reasonable conditions will serve only as a springboard for demands by self-interested parties seeking to exploit the transaction for "relief" to which they are not entitled.

DISCUSSION

I. Liberty Media Already Has Accepted The Conditions Set Forth In *The News Corp. Order.*

Three years ago, the Commission exhaustively analyzed the competitive effects of News Corp.'s acquisition of *de facto* control of DIRECTV. *General Motors Corp. And Hughes Electronics Corp., Transferors, and The News Corporation Ltd., Transferee* 19 FCC Rcd. 473 (2004) ("*News Corp. Order*"). In that proceeding, the Commission considered News Corp.'s ownership of: (a) a broadcast network with 171 television station affiliates; (b) 35 full-power television broadcast stations serving most major markets in the country; (c) 11 national cable programming networks, including the most popular cable news network; and (d) attributable interests in 22 regional programming networks, including 19 regional sports networks, 12 of which it owned and managed. *Id.* at ¶¶3, 7, 49 & n. 170, 134. The Commission concluded, after considering petitions and objections by many of the same parties appearing as Petitioners and Commenters here, that News Corp.'s proposed acquisition of *de facto* control of DIRECTV would serve the public interest.

Based upon its detailed analysis of the record, the Commission specifically concluded that:

- News Corp.'s acquisition "does not present horizontal concentration issues." *News Corp. Order* at ¶75.

- Existing program access rules and conditions proposed by DIRECTV and News Corp. are sufficient to prevent discrimination against unaffiliated programmers and against other MVPDs with respect to "access to national and non-sports regional programming." *Id.* at ¶¶107, 124, 132, 365.

- Notwithstanding the vertical integration between News Corp. and DIRECTV, the conditions imposed by the Commission would be sufficient to prevent discrimination against other MVPDs in the acquisition of regional sports networks ("RSNs") and local broadcast television programming controlled by News Corp. *Id.* at ¶¶172-179, 218-226, 368.

No participant in this proceeding has presented any data suggesting that these conclusions were wrong then or should be changed now.

In contrast to News Corp., Liberty Media had no attributable broadcast or regional sports network interests when it submitted the Transfer Application. Nevertheless, Liberty Media agreed to be bound by all of the RSN conditions set forth in the *News Corp. Order* because it will acquire three RSNs in the proposed transaction. Transfer Application at 2. When it subsequently agreed to acquire a television station in Green Bay, Wisconsin (and its satellite station in Escanaba, Michigan), Liberty Media clearly stated that it also would agree to the broadcast conditions imposed in the *News Corp. Order*. *See* Letter from Robert L. Hoegle to Marlene H. Dortch, MB Docket No. 07-18 (Feb. 16, 2007). Thus, Liberty Media has agreed to be bound by exactly the same conditions imposed by the Commission upon News

Corp. to address any potential anticompetitive issues arising from News Corp.'s vertically integrated programming. In doing so, Liberty Media has satisfied any legitimate public interest concerns that might arise from its substitution as the 38.4% shareholder of DIRECTV.

However, certain Petitioners and Commenters argue that Liberty Media either has substantively modified the relevant conditions in the *News Corp. Order* or has been evasive as to their applicability. *See*, *e.g.*, EchoStar Petition at 11-17; Consumers Comments at 2-3. Their claims simply are not accurate. Liberty Media does not believe that there is any ambiguity regarding the nature and duration of its offer to accept the *News Corp. Order* conditions. The conditions extend for a six-year period from the date of closing of the Share Exchange Agreement that was included as an Exhibit to the Transfer Application. The RSN conditions apply to the three RSNs that Liberty Media will acquire pursuant to that Agreement, and to any additional RSNs acquired by Liberty Media during that six-year period (although such acquisitions would not extend the six-year period). Likewise, the broadcast conditions apply to the Green Bay and Escanaba stations as well as to any additional television broadcast stations subsequently acquired by Liberty Media for the six-year period.

Finally, to the extent that EchoStar criticizes Liberty Media for adding the words "in the United States" to the exclusivity condition in the *News Corp. Order* (EchoStar Petition at 15-17), the addition was not intended as a "stealth modification" of the condition (*Id.* at 17), but rather to reflect the fact that the Commission's jurisdiction does not extend beyond the United States. *See* 47 U.S.C. §152 (Communications Act, as amended, applies to "all persons engaged within the United States...in communication by wire or radio.") Liberty Media's commitment to abide by the conditions in the *News Corp. Order* is clear and is sufficient to address any public interest concerns arising from the proposed transaction.

II. Petitioners Fail To Comply With The Basic Requirements For Petitions To Deny.

Section 309(d) of the Communications Act, 47 U.S.C. §309(d), requires a party filing a petition to deny an application pending before the Commission to support the factual allegations upon which its petition is based with an "affidavit of a person or persons with personal knowledge thereof." *See also* 47 C.F.R. §25.154(a)(4) (petition to deny must "[c]ontain specific allegations of fact (except for those of which official notice may be taken) to support the specific relief requested, which shall be supported by affidavit of a person or persons with personal knowledge thereof"). The three Petitioners have failed to comply with this fundamental requirement.

HITN, NDB and EchoStar have filed petitions to deny the transfer application. HITN and NDB[2] did not include any affidavit or declaration to support their petitions. The absence of specific allegations of fact supported by affidavit, as required by statute and the Commission's rules, renders Petitioners' submissions procedurally defective. *See Joe McKissock,* 21 FCC Rcd. 2187, 2188 (2006) (petitioner "has not submitted the requisite affidavit, and therefore his pleading is procedurally defective and cannot be considered a petition to deny"); *Columbia Broadcasting System, Inc.*, 46 FCC 2d 903, 904-05 (1974) (affidavit must "advise the applicant of the particular facts in the petition within the personal knowledge of the affiant").

HITN provides only self-serving speculation and "concern" about hypothetical "risks" in lieu of the specific allegations of fact required by statute and Commission rules:

[2] NDB's Petition is confined to the issue of DIRECTV's provision of local-into-local service in all 210 television markets in the United States. DIRECTV addresses that issue in its response to the NDB Petition.

(a) "If News Corp and Liberty Media have a coordinated content strategy, the transfer of control may effectively further saturate concentration rather than reduce media concentration" (HITN Petition at 7);

(b) All "existing channels that are independent of the buyers, sellers, mainstream broadcast or cable outlets" should be "guaranteed carriage" to ensure against "a risk that the buyer and seller are coordinating actions to make room for their preferential carriage agreements" (*Id.* at 7 n. 14).

HITN offers absolutely nothing to support its alleged "concern" that Liberty Media may have a "coordinated content strategy" with DIRECTV and News Corp., but advances such speculation solely to support its claim to "guaranteed carriage" on DIRECTV, *i.e.,* carriage rights superior to all other programmers.[3]

Instead of providing "specific allegations of fact" supported by affidavits of persons *with personal knowledge* as required by statute and Commission regulation, EchoStar provides page after page of scurrilous speculation and innuendo regarding Liberty Media and Dr. John C. Malone, Liberty Media's Chairman, "supported" only by citations to newspapers, magazines and trade publications, most of which are more than a decade old. EchoStar Petition at 2-10. In addition to their untimeliness, the Commission repeatedly has stated that newspaper articles and other such publications are hearsay and "are not an acceptable substitute for the 47 U.S.C. 309(d)(1) requirement that allegations contained in the petition to deny must be supported by the affidavit of a person or persons with personal knowledge of the facts alleged." *Mississippi Authority for Educational TV*, 79 FCC 2d 577, 579 (1980); *see also CBS Inc.*, 49 FCC 2d 743, 745 (Rev. Bd. 1974) ("unverified newspaper stories are clearly hearsay and therefore fail to provide the necessary basis for enlargement of the issues" in a licensing hearing). EchoStar then attempts to bootstrap itself into compliance with the

[3] DIRECTV addresses HITN's allegations concerning DIRECTV's compliance with its obligations under Section 335 in its response to the HITN Petition.

Commission's procedural requirements by providing the "Declaration of Eric Sahl," generically stating that "the allegations of fact in the foregoing [Petition] are true and correct to the best of my knowledge, information and belief." However, such a generalized affidavit is insufficient to comply with the Commission's requirements for petitions to deny. *See, e.g. Columbia Broadcasting System, Inc.*, 46 FCC 2d 903, 904-05 (1974) ("It appears plain, of course, that affidavits are insufficient under Section 309(d)(1) where the verification of the affiant is only according to the affiant's knowledge, information and belief" and expresses only "the general and conclusory opinions" of the affiant).

In any event, EchoStar's time-worn and unsupported allegations are irrelevant to the current transaction. The Commission has stated clearly that "even as to consideration of past conduct indicating 'a flagrant disregard of the Commission's regulations and policies,' a ten year limitation should apply." *In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1229 (1986), *modified*, 5 FCC Rcd. 3252 (1990). The Commission imposed the ten-year time limitation because of the "'inherent inequity and practical difficulty' involved in requiring applicants to respond to allegations of greater age." *Id.; see also Application of TRW, Inc. and Northrop Grumman Corp.*, 17 FCC Rcd. 24625, 24629 (2002) (the Commission's ten year limitation was designed "to prevent the agency from forcing licensees to defend themselves from stale charges"). The Commission has used its broadcast character policy statement "as guidance in resolving similar questions in transfer of common carrier authorizations and other license transfer proceedings." *See News Corp. Order* at ¶23. Thus, EchoStar's arguments based on archaic, biased and multiple hearsay statements not only fail to comply with the procedural rules applicable to petitions to deny, but they also are irrelevant under applicable Commission policy.

The outdated allegations advanced by EchoStar also ignore a host of statutory, regulatory and marketplace developments over the past 15 years or more. For example, EchoStar contends that Liberty "was created by TCI...in 1991 as a means to blunt governmental criticism of the market power TCI had" at a time when "TCI/Liberty had stakes in four of the nation's ten largest cable channels." EchoStar Petition at 2. Even if its allegations were true, EchoStar ignores the major statutory and regulatory initiatives addressing issues raised by vertical integration in the cable television industry. *See, e.g.*, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report & Order,* 8 FCC Rcd 3359 (1993); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition,* 17 FCC Rcd. 12124 (2002) (*"Program Access Order"*); *Implementation of Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(C)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition, Notice of Proposed Rulemaking*, MB Docket No. 07-29; FCC 07-7 (rel. Feb 20, 2007).

In addition, Liberty Media ceased to be affiliated in any way with TCI (which no longer exists as a separate company) in 2001. Unlike News Corp., Liberty Media currently holds no interests in any United States distribution media (other than a 0.10 percent interest in the parent of a cable system in Puerto Rico) and no interests in any "must-have" broadcast or regional sports network programming service. Liberty Media has agreed to acquire three RSNs in the current transaction and two broadcast television stations in a separate transaction[4] and it has agreed to accept all conditions imposed upon News Corp. based on News Corp.'s far more extensive ownership of broadcast television stations and RSNs.

Finally, many of the EchoStar allegations are simply nonsensical. EchoStar asserts that "the past conduct of Liberty when vertically integrated and/or closely affiliated with a powerful MVPD" includes extensive "excesses and abuses with respect to programming," one of which was that Liberty "operated ruthlessly in acquiring and creating programming." EchoStar Petition at 3-4. Liberty Media respectfully submits that its acquisition and creation of programming has benefited the video industry and the public. For example, EchoStar concedes that "the regional sports business was 'born' when TCI/Liberty 'started services in cities like Pittsburgh and Seattle.'" EchoStar Petition at 13 n. 34. Apparently EchoStar considers such "ruthless creativity" by Liberty Media to be contrary to the public interest and grounds to deny the present application.

III. The Ancillary Agreements Do Not Provide News Corp. With Any Vestigial Interest In DIRECTV.

EchoStar and Consumers attempt to raise questions regarding the nature and duration of certain Ancillary Agreements referenced in the Share Purchase Agreement. *See* EchoStar Petition at 28 ("the Share Exchange Agreement provided by the Applicants contains references to 'Ancillary Agreements' with suggestive names"); Consumers Comments at 4-5 ("a series of provocatively named agreements ancillary to the transaction...have not been included" in the application). EchoStar and Consumers contend, based on nothing more than the "suggestive"

[4] On April 6, 2007, the Media Bureau approved the application to transfer control of the licenses for these two television stations to an indirect, wholly-owned subsidiary of Liberty Media.

or "provocative" names of the Ancillary Agreements,[5] that they conceal a continuing interest by News Corp. in DIRECTV. They argue that these Agreements must "be produced immediately for full scrutiny and comments by the public" to ensure that "this transaction truly unwinds the relationship between DIRECTV, News Corp. and Liberty." *See* EchoStar Petition at 27-28; Consumers Comments at 4-5. EchoStar at one point complains that "the terms and length of these Agreements are not known," but nevertheless argues that "TCI/Liberty's tactics in tying up programming long-term immediately prior to transactions is (sic) also relevant, and directly analogous to this transaction's Ancillary Agreements." EchoStar Petition at 5, 28.

Despite the self-serving speculation and conjecture of EchoStar and Consumers, the Ancillary Agreements do not relate to any ongoing ownership, management or other vestigial interest by News Corp. in DIRECTV.[6] Rather, with the exception of the DTV Non-Competition Agreement, the Ancillary Agreements relate to various technical, production, administrative, backdrop feed and national advertising sales services that Liberty Media will need to operate the RSNs for some period of time after closing the transaction.

Liberty Media will acquire the following three regional sports networks ("RSNs") in the transaction: Fox Sports Net Rocky Mountain LLC, Fox Sports Net Pittsburgh LLC and Fox Sports Net Northwest LLC. Each of the RSNs operates a regional video programming

[5] The Ancillary Agreements include the National Sports Programming Agreement; National Advertising Partners Agreement; Technical Services Agreement; Transitional Services Agreement; Production Services Agreement; Sports Access Agreement; Webpage Services Agreement; Fox Sports Direct Representation Agreement; Regional Sports Network License Agreement; Global Affiliation Agreement Side Letter; DTV Non-Competition Agreement and the RSN Subsidiary Non-Competition Agreement.

[6] EchoStar and Consumers also allege that News Corp. will continue to have an attributable interest in DIRECTV by virtue of Chase Carey's position as a Director of both companies. *See* EchoStar Petition at 29-30; Consumers Comments at 5-6. However, Liberty Media understands that Mr. Carey will resign his post as a Director of News Corp. upon completion of the proposed transaction.

network devoted to local professional (Major League Baseball, National Basketball Association, and/or National Hockey League games, as well as games of other professional leagues) and amateur sports for distribution by multi-channel video programming distributors. The geographic area in which each RSN distributes programming largely is determined by the area(s) for which the local professional teams have television rights. Although each RSN has its own office and production facilities with local management, production and advertising sales staffs, certain additional services are required in order to operate the RSNs due to the nature of the service they provide.

Although each RSN has its own manager and support personnel, Liberty Media ultimately expects to provide certain centralized services, such as human resources, accounting and legal. However, over an initial period of approximately two years, the RSNs may obtain certain basic administrative services pursuant to a Transitional Services Agreement with Fox Sports Net, Inc. ("FSN"). The RSNs may terminate most of these categories of services upon sixty days' notice.

For its regional sports programming service, each RSN also must uplink the feed for each local game to a satellite so that the games may be integrated into the programming service to be transmitted to multiple cable and DBS operators. The game feeds are supplemented by other local programs and programming from a backdrop feed, and commercials sold by the RSN must be inserted into such feeds. Further, the geographic areas licensed by professional leagues for exhibition of professional team programming may vary. Consequently, subscribers to a particular RSN may receive different programming because certain professional sports programming must be blacked out in areas outside the league authorized territory and substitute backdrop programming inserted. Thus, the integrated programming service and black-out programming often are re-uplinked simultaneously. Clearly, this requires sophisticated equipment and expertise, and the RSNs are entering into a Technical Services Agreement with FSN to provide necessary technical services for a transition period of up to five years. The RSNs may terminate such agreement at the end of the first or second year of its term.

Each RSN produces its own games and local programming and employs or hires the necessary on-air talent and technical personnel to produce and uplink game telecasts. However, the RSNs exhibit programming 24 hours per day, 7 days per week. Therefore, the RSNs must obtain additional programming for those time periods when there are no games involving local teams. In addition to supplemental programs produced locally by the RSNs, such as local coaches, talk and pre/post-game shows, the RSNs are entering into the "Fox Sports Net License Agreement" with FSN to obtain access to FSN's "backdrop feed" through 2011 for such additional programming. Other RSNs that have no ownership affiliation with Fox, including RSNs owned by Comcast and Cablevision, also have entered into agreements to obtain FSN backdrop programming.

Each RSN also provides certain highlights from local games, as well as other programming produced by the RSN, to FSN for use by FSN on the national feed. The Production Services Agreement identifies the programming that will be produced by the RSN and provided to FSN and the terms upon which it will be provided for a period of one year. In a similar manner, the Sports Access Agreement authorizes Sports Access to provide news services with access to the RSN programming service for news gathering and monitoring purposes and to excerpt highlights for use in news programming. It is terminable on 90 days written notice, effective upon conclusion of the relevant professional sports season. Pursuant to the Webpage Services Agreement, Fox Interactive Media, Inc. will provide certain webbased services to the RSNs as long as the RSNs continue to receive the FSN backdrop feed pursuant to the Fox Sports Net License Agreement. Again, the RSNs may terminate this agreement upon 90 days notice.

Further, each RSN has an advertising sales staff for the sale of local advertising. However, for national advertising sales, which may involve sales across multiple RSNs, each RSN is entering into a National Advertising Sales Representation Agreement with National Advertising Partners through December 31, 2011.

The Regional Sports Network License Agreement authorizes Fox College Sports to use certain high school and college event programming produced by the RSNs as part of the FCS pay television service, and sets forth the terms and conditions upon which the RSNs will provide such programming to FCS through 2011 and the fee to be paid by FCS for such programming.

Fox Sports Direct already has entered into distribution agreements with DIRECTV and EchoStar that include the RSNs. The FSD distribution agreements provide for "out-of-market" distribution of the RSN programming by DIRECTV and EchoStar. The FSD Representation Agreement merely continues FSD's representation of the RSNs under the existing agreements between FSD and DIRECTV and EchoStar, and is terminable in the event that DIRECTV and/or EchoStar agree to separate one or more of the RSNs from the FSD Agreements.

The Global Affiliation Letter Agreement generally requires Liberty Media and DIRECTV to honor existing Global Affiliation Agreements that provide for carriage of various Fox Networks, including the RSNs proposed to be transferred to Liberty Media, during the term of such agreements or until one or more of the RSNs is severed from a particular Global Affiliation Agreement.

The RSN Subsidiary Non-Compete Agreement generally prohibits News Corp. and its affiliates from competing with the RSNs in their service areas for a period of five years after the closing. The DTV Non-Competition Agreement generally prohibits News Corp. and its affiliates from competing with DIRECTV in the business of providing direct-to-home delivery of video services by satellite for a period of four years from the closing date and from soliciting executive officers or members of senior management from DIRECTV for a period of two years.

The Ancillary Agreements were negotiated at arms length with News Corp. and provide for various services during the period after closing, when News Corp. will no longer hold any interest in DIRECTV. With the exception of the DTV Non-Competition Agreement, those agreements all relate to Liberty Media's operation of the RSNs and are irrelevant to the issues before the Commission in this transaction. Nevertheless, Liberty Media is willing to provide copies of those agreements to the Commission subject to an appropriate protective order, but objects to their being part of the public record in this proceeding.

IV. The Affiliation Agreements Between DIRECTV And Liberty Media Affiliated Programmers Are Irrelevant.

Petitioner HITN argues that "the FCC should look closely into the carriage agreements of DIRECTV and any actions taken in anticipation of the Transfer of Control that could be viewed as setting the stage for preferential treatment for content from the buyer or seller." HITN Petition at 7. HITN speculates that "if News Corp. and Liberty Media have a coordinated content strategy, the transfer of control may effectively further saturate concentration rather than reduce Media concentration." *Id.* Based on that speculation -- and nothing else -- HITN argues that the Commission must carefully review DIRECTV's carriage agreements to "ensure that content providers with no market power are not discriminatorily sacrificed to make room for more content from the buyer, seller, mainstream cable or broadcast content services." *Id.* HITN then suggests that the "best way" to ensure that independent programmers are not discriminated against is for the Commission to provide "guaranteed carriage" to such programmers regardless of the nature of their programming or its popularity. *Id.* at n. 14.

There is no factual or legal basis for reviewing DIRECTV's affiliation agreements. Liberty Media already has agreed to be bound by the condition that neither it nor DIRECTV "will discriminate against unaffiliated programming services in the selection, price, terms or conditions of carriage." Transfer Application at 4. The Commission previously concluded that this commitment, when made three years ago by News Corp., "adequately addresses concerns raised regarding unaffiliated video programmers' access to the DIRECTV platform." *See News Corp. Order* at ¶107. No Petitioner or Commenter has provided any data or analysis suggesting that the same commitment by Liberty Media is now inadequate.[7]

Ignoring the fact that DIRECTV and News Corp. have been bound by the conditions in the *News Corp. Order* for the past three years, EchoStar and Consumers also suggest that News Corp. and DIRECTV reached "sweetheart" affiliation agreements for News Corp. programming services that will enable News Corp. "to maintain the benefits of vertical

[7] In addition, given the fact that DIRECTV subscribers account for only 15.72% of the overall MVPD marketplace, it has neither the incentive to refuse to carry popular programming nor the ability to foreclose an unaffiliated programmer from the MVPD marketplace. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd. 2503 (2006) ("*Twelfth Annual Video Competition Report*"), at Table B-3.

integration" after its "direct ownership interest in Liberty and DIRECTV is eliminated by this transaction." Consumers Comments at 4;[8] *see also* EchoStar Petition at 28-29 ("it is also apparent that DIRECTV made long-term arrangements with at least some News Corp. programming networks in the days surrounding the announced merger"). The sole support offered by EchoStar and Consumers for these suggestions is the allegation that there is a most favored nations ("MFN") clause in the DIRECTV affiliation agreement for the Fox News Channel. *Id.* On that basis alone, Consumers has suggested that the Commission "should demand production of existing carriage agreements and conduct a searching inquiry" in order to determine whether the News Corp. and DIRECTV "financial interests remain intertwined." Consumers Comments at 4.

Of course, the Commission has never held that an MFN provision in an affiliation agreement gives rise to some form of attributable interest between the programmer and the distributor. As EchoStar knows well, the existence of an MFN would confirm that the agreement was negotiated at arms' length. A distributor seeks an MFN to ensure that the programmer has given its best price and terms and conditions to that distributor. If the programmer then gives a better deal to another distributor, the distributor that has MFN rights is protected. Further, affiliation agreements between News Corp. and DIRECTV were subjected to review and approval by a committee of independent directors to ensure that the agreements were fair to the other 61.6% of DIRECTV's shareholders. Petitioners and Commenters have offered no justification for wholesale review of DIRECTV's affiliation agreements. Again, the Petitioners and Commenters seek relief to which they are not entitled.

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[8] Consumers is mistaken in stating that News Corp.'s interest in Liberty Media will be eliminated by this transaction because News Corp. had no interest in Liberty Media.

V. There Is No Basis For Prohibiting Exclusive Agreements With Third-Party Programmers Or Otherwise Restricting Liberty Media From Acquiring Or Creating Programming.

EchoStar and RCN request that the Commission extend the prohibition on exclusive programming arrangements beyond its current application to affiliated programmers, such that DIRECTV would be prohibited from entering into any exclusive programming arrangements, even with third-party programmers. For example, RCN contends that the Commission should prohibit DIRECTV (as well as Liberty Media and News Corp.) from entering new agreements with third parties to obtain "must-have" programming (which RCN apparently defines as any and all sports programming) on an exclusive basis. *See* RCN Comments at 8 ("RCN proposes that the Applicants be bound by a condition which limits Applicants' ability to enter into exclusives for local, regional and national sports programming whether or not it is vertically integrated with the programming vendor"). RCN also suggests that, with respect to any existing "sports exclusives" with third-party programmers, the Commission "require that DIRECTV enter into reasonable and non-discriminatory sublicense agreements with other MVPDs to make the non-duplicable programming available." *Id.* However, RCN does not want DIRECTV's "format and packages" containing the exclusive sports programming; rather, it "seeks to have the non-duplicable content made available to competitors so that they may also develop their own differentiated programming options" that include the "exclusive" content. *Id.* at 8, n. 21.

EchoStar would extend the exclusivity ban beyond "must-have" programming from third-party providers, to any programming whatsoever: "The Applicants should not be permitted to acquire <u>any</u> additional exclusive programming content rights." EchoStar Petition at 21 (emphasis added). EchoStar further proposes that the First Amendment be rescinded as to Liberty Media and DIRECTV, suggesting that they be banned from acquiring any additional programming without government approval. "Liberty has also not committed to foregoing the acquisition or creation of additional programming...in any manner going forward. ...[A]pplicants could demonstrate some modicum of public interest benefit if it (sic) committed that no Liberty entity would acquire programming assets absent prior Commission approval." *Id.* at 32.

Again, EchoStar and RCN offer no facts to support these onerous and unlawful restrictions upon Liberty Media and DIRECTV. Vertically integrated cable operators with far more subscribers than DIRECTV are not prohibited from entering into exclusive programming agreements with unaffiliated programmers for sports programming or any other type of programming content. For example, the Commission expressly rejected such ban on exclusive arrangements with third-party programmers in the context of cable mergers with substantially greater numbers of subscribers than DIRECTV. *See Applications for Consent to Transfer of Control of Licenses from Comcast Corp. and AT&T Corp. Transferors, to AT&T Comcast Corp. Transferee,* 17 FCC Rcd. 23246, 23288-89 (2002); *Applications For Consent to Transfer of Control of Licenses and Section 214 Authorizations From MediaOne Group, Inc., Transferor, to AT&T Corp. Transferee* 15 FCC Rcd. 9816, 9854 (2000); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors and Transferors, Comcast Corporation and Time Warner, Inc., Assignees and Transferees*, 21 FCC Rcd. 8203, 8281-82 (2006) (*"Adelphia Approval Order")*. The Commission also has rejected the proposed expansion of the exclusivity ban to third-party programmers in the context of the program access rulemaking proceedings, finding that such an extension would directly contradict Congressional intent. *See Program Access Order*, 17

FCC Rcd. at 12158. RCN's suggestion that DIRECTV be required to make available to all competing MVPDs exclusive sports programming for which DIRECTV has contracted, so that those competitors could use it to create "their own differentiated programming options," is analogous to requiring CBS, for example, to make its telecast of the Super Bowl, March Madness or the Masters Golf tournament available to all other broadcast networks so that they can use it to develop their own "differentiated" programming schedule. In any event, there certainly is no legitimate basis for imposing such a nonsensical requirement on a single MVPD in the context of this Transfer Application proceeding.[9]

VI. There Is No Factual Or Legal Basis For Extending Program Access Conditions To Non-Video Programming Platforms.

EchoStar also suggests that the program access rules and the conditions set forth in the *News Corp. Order* be expanded "to apply to online and interactive programming, features and platforms." EchoStar Petition at 23. EchoStar intends this additional restriction to apply to Internet and mobile video platforms as well as interactive television programming. *Id.* Again, EchoStar offers no factual justification for its proposal, which clearly is intended to place additional burdensome competitive restraints on DIRECTV and Liberty Media that would not apply to EchoStar.

Ironically, EchoStar complains that Liberty Media has failed "to substantiate a single public interest benefit" arising from the proposed transaction, then simultaneously seeks to impose restrictions on the transaction that would impede several of the benefits identified in the Transfer Application. In addition to reducing current levels of media consolidation and

[9] "The goal of our license transfer application review process is to allow parties to realize the economic efficiencies associated with the transaction while ensuring that any harms resulting from the license transfer are mitigated and some portion of the benefits of the transfer are passed on to the public. An application for a transfer of control of Commission licenses is not an opportunity to correct any and all perceived imbalances in the industry. Those issues are best left to broader industry-wide proceedings." *News Corp. Order* at ¶131.

vertical integration, the Applicants stated that the proposed transaction presents opportunities for Liberty Media and DIRECTV to bring new services to consumers using Liberty Media's expertise in interactive commerce and other technologies. Transfer Application at 8-10, 20-21. EchoStar lampoons Liberty Media's "'innovative' histor[y]" (EchoStar Petition at 33), but it is forced to admit elsewhere in its Petition that Liberty Media has a history of "ruthlessly... creating programming" (*Id.* at 3), including giving birth to the "regional sports business" (*Id.* at 13 n. 34), which the Commission now considers to be "must-have" programming for an MVPD.

EchoStar's obvious fear is not that Liberty Media will fail to create new services in conjunction with DIRECTV, but rather that it might be successful in doing so.[10] For that reason, EchoStar seeks to expand the "full reach of the programming conditions" in the *News Corp. Order* not only to "interactive and on-demand services" delivered via the subscriber's television, but also to Internet and mobile-based services that may be offered by Liberty Media and/or DIRECTV.

There is no public interest justification for the broad expansion of the programming conditions sought by EchoStar. Although DIRECTV has developed and rolled out a variety of interactive features, EchoStar concedes that "other MVPDs have bolstered their interactive services as well." EchoStar Petition at 23 n. 54. In any event, the Commission's program access rules expressly apply only to "video programming" which is defined in the Communications Act as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. §522(20). Thus, there

[10] "Liberty's direct affiliation with DIRECTV" will bring Liberty's "experience and expertise in the areas of interactive television, broadband access, and interactive commerce" directly to "center stage" and "changes the equation dramatically." EchoStar Petition at 23-24 and n. 55.

is no statutory or regulatory basis for the Commission to extend the program access rules or conditions to services provided over the Internet or via wireless mobile.

VII. Additional Conditions Are Unjustified By the Record Facts and Are Unnecessary.

EchoStar and several Commenters seek to expand substantially the conditions in the *News Corp. Order* for this transaction. Others seize upon the Transfer Application to address a variety of self-interests that are not specific to this transaction. Again, the Petitioners and Commenters offer no factual or empirical support for the "relief" they seek.

In addition to seeking to ban all exclusive agreements by DIRECTV, Liberty Media and News Corp. and to expand the conditions to cover Internet and mobile platforms, EchoStar would extend the program access conditions to "provide third-party arbitration for all Liberty programming." EchoStar Petition at iii, 14-15. Liberty Media already has committed to the continued application of the antidiscrimination and program access rules. In addition, Liberty Media has committed to the additional RSN and broadcast conditions set forth in the *News Corp. Order*. However, EchoStar and others would expand the *News Corp. Order* conditions to "all Liberty entities, which should be defined to include without limitation any entities in which Liberty Media or its principal shareholder, Dr. Malone, has an attributable interest," including Discovery Holding Company and its subsidiaries. EchoStar Petition at 14-15; ACA Comments at 7-9; HITN Petition at 6-7 and n. 12.

A. Discovery.

At the outset, neither Discovery Holdings Company ("DHC")[11] nor Discovery Communications, Inc. ("Discovery") is a party to the Transfer Application or this proceeding.

[11] Liberty Media completed the spin-off of DHC, which included Liberty Media's 50 percent interest in Discovery and certain other assets, to Liberty Media's shareholders in 2005. As a result, Liberty Media holds no stock or

Discovery is subject to the Commission's program access rules by virtue of the partial ownership of Advance/Newhouse. In addition, the existing conditions applicable to DIRECTV, to which Liberty Media has agreed, will limit DIRECTV's dealings with Discovery. However, imposition of additional conditions directly on Discovery in this proceeding is unwarranted and would constitute a denial of due process. Again, such conditions also would be contrary to the Commission's treatment of Liberty Media in the *News Corp. Order*. *See News Corp. Order* at ¶127 n. 378.

B. National Non-Sports Programming.

There is no basis for imposing a commercial arbitration remedy for national non-sports cable programming affiliated with Liberty Media. The Commission determined that "News Corp.'s general entertainment and news cable programming networks participate in a highly competitive segment of [the] programming market with available reasonably close programming substitutes." News Corp. Order at ¶129. Consequently, the Commission concluded that "as a general matter, the Commission's program access rules are satisfactory to address any imbalance of power between News Corp. and competing MVPDs with respect to national and non-sports regional cable programming networks." Id. at ¶132.[12] There is no

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ownership interest in DHC. However, Dr. John C. Malone, Liberty Media's Chairman, serves as Chairman of the Board, Director and Chief Executive Officer of DHC and owns shares of DHC's common stock representing approximately 27.6 percent of DHC's aggregate voting power and 4.9 percent of DHC's equity. Four members of Liberty Media's board of directors, including Dr. Malone, also serve as directors on DHC's five-member board. Although Discovery recently announced that it intends to acquire Cox Communications Inc.'s 25 percent interest in Discovery, existing shareholder agreements with Advance/Newhouse Programming Partnership ("Advance/Newhouse") provide each of Advance/Newhouse and DHC with negative control over Discovery. *See* Transfer Application at 11.

[12] Again, the Commission rejected RCN's request for an arbitration remedy and concluded in the *Adelphia Approval Order* at ¶168 that:

> With respect to nationally distributed programming, we find that the existing program access rules will ensure that competing MVPDs have access to programming networks that are affiliated with Comcast or Time Warner and that the terms and conditions of that access do not unfairly disadvantage competing MVPDs.

reason to alter that conclusion for national and non-sports regional programming networks affiliated with Liberty Media. The Commission imposed the commercial arbitration remedy only with respect to News Corp.'s RSN and broadcast programming, and Liberty Media already has agreed to those conditions.

C. Small And Medium Sized Cable Operators.

ACA also seeks a variety of conditions relating to small and medium cable operators.[13] For example, ACA would modify the current requirements for notices of intent to arbitrate by giving small and medium cable operators more time to provide such notices. ACA Comments at 11-12. Specifically, ACA would expand the initial notice period from 5 to 20 business days and the period for arbitration demands from 20 to 45 days because the current periods purportedly are "difficult to track and overly burdensome for small companies with limited administrative resources." *Id* at 12. However, even if true, ACA's purported problem is not specific to this transaction. In addition, the commercial arbitration provisions apply to limited categories of purportedly "must-have" programming, rendering hollow ACA's complaints that tracking arbitration deadlines for such programming is too "difficult" and "burdensome."

ACA also seeks to use this proceeding to re-write the definition of a "small cable operator" so that all of its members will qualify. ACA Comments at 14-16. In the *News Corp. Order*, the Commission permitted a "small cable company" to appoint a bargaining agent "to bargain collectively on its behalf in negotiating carriage of RSNs" and broadcast programming with News Corp. *See News Corp. Order* at Appendix F. For purposes of those provisions, the Commission adopted its existing definition of a small cable company, *i.e.* one with "400,000 or fewer subscribers." *Id.* at n. 4.

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[13] News Corp. addresses ACA's allegations regarding collective bargaining issues with Fox Cable separately in its response to the ACA Comments.

ACA would revise the definition to cover any cable operator that "serves" less than 1.5% of U.S. television households, *i.e.* over 1.5 million "served" households, which apparently is ACA's euphemism for subscribers. ACA Comments at 14. ACA's proposed definition of "small" likely would include the tenth largest MVPD in the nation. *Twelfth Annual Video Competition Report* at Table B-3. ACA contends that the change is necessary because: (a) Liberty's "diverse international media interests plus its affiliation with DHC dwarf the operations, assets and resources of any ACH member;" and (b) "the 400,000 subscribers threshold threatens underinclusion" in terms of "offsetting the immense disparity in market power between smaller distributors and the owner of RSNs and DIRECTV." *Id.* at 15-16. News Corp. obviously has substantial and "diverse media interests" and owns far more RSNs than Liberty Media would after the transaction. Nevertheless, the Commission used the existing 400,000 subscriber definition in its rules in the *News Corp. Order*. There is absolutely no reason to revisit that decision in the context of this transaction.

ACA also seeks a ten-year term for application of the *News Corp. Order* conditions to Liberty Media and DIRECTV. ACA Comments at 17. ACA contends that the extended term is necessary because: (a) Fox Cable's "resistance to the collective bargaining process with NCTC has squandered nearly half of the six-year term;"[14] and (b) "ACA members report that many Liberty/DHC-affiliated programming and RSN contracts are for terms in excess of five years." *Id.* However, ACA provides no information about when such programming agreements began or will expire. In short, there is absolutely no basis -- other than ACA's wishes -- for extending the term of the Commission's conditions. The Commission again

[14] This issue will be addressed by News Corp. in its response to the ACA Comments. With no support whatsoever, ACA argues that "Liberty will have the same incentive and ability as Fox Cable to footdrag." *Id.* at 17.

confirmed that the six-year term of the conditions was appropriate in the *Adelphia Approval Order* at ¶157.

Finally, ACA seeks to use this application proceeding as a vehicle to prohibit programmers from offering "volume discounts" to distributors that can make their programming available to large numbers of subscribers, claiming that "[f]or small and medium-sized cable operators," such volume discounts are "a euphemism for abuse of market power." ACA Comments at 12-13. Consequently, ACA contends that Commission approval of the Transfer Application should be conditioned on a "prohibition on Liberty/DHC engaging in any noncost-based price discrimination when dealing with small and medium-sized cable operators or their buying group." *Id.* at 14.

Again, ACA completely fails to provide any factual or legal basis for the relief it seeks. The Commission expressly has concluded that "[v]endors may use volume-related justifications to establish price differentials to the extent such justifications are made available to similarly situated distributors on a technology-neutral basis." 47 C.F.R. §76.1002(b)(3)(note). To the extent that ACA believes that such prohibitions should be part of the Commission's anti-discrimination rules, it should petition the Commission to commence a notice and comment rulemaking, rather than seeking such relief as ransom for grant of the Transfer Application.

VIII. Liberty Media Does Not Own the Puerto Rico Cable System and Insulation Would Remedy Any Potential Competitive Issue.

Although EchoStar acknowledges that the Commission does not prohibit cable television-DBS cross-ownership, EchoStar nonetheless asserts that "divestiture" of Liberty Cablevision of Puerto Rico Ltd. ("LCPR") is "the only measure...adequate to alleviate the competitive harm in this case." EchoStar Petition at 26; *see also* Consumers Comments at 8 ("the Commission should require divestiture of Liberty Cablevision's holdings" in Puerto Rico "in order to protect the public interest").

At the outset, Liberty Media cannot divest LCPR because it does not own LCPR. Rather, LCPR is an indirect wholly-owned subsidiary of Liberty Global, a separate publicly-traded company. As reported in the Transfer Application, Liberty Media holds shares in Liberty Global representing less than 0.10 percent of Liberty Global's voting power. Transfer Application at 11. The divestiture of Liberty Media's *de minimis* interest in Liberty Global therefore would be a meaningless exercise having no effect on the alleged "competitive harm."

Dr. Malone serves as Chairman of the Board of Liberty Global and owns Liberty Global stock representing approximately 24.9 percent of its aggregate voting power and 2.4 percent of its outstanding equity as of April 1, 2007.[15] Dr. Malone has offered to insulate himself from any decisions regarding the operations of LCPR, including, without limitation, LCPR's carriage and pricing decisions. Alternatively, the Commission could require DIRECTV to insulate Dr. Malone from the activities of DIRECTV Latin America that relate to Puerto Rico.

The Commission repeatedly has endorsed the type of insulation or recusal arrangement that Dr. Malone has volunteered to undertake in order to eliminate an otherwise cognizable interest of such officer or director. Thus, the FCC has stated that "[a]s a general matter, we believe that the recusal standard is appropriate" and has outlined the following insulation steps to achieve recusal:

[15] These figures vary slightly from the figures (24.1 percent of voting power and 3.8 percent of outstanding equity) reported in the Transfer Application at 11-12 and reflect more recent information regarding the overall total outstanding stock of Liberty Global.

> We have stated that parties must take steps to prevent "the recused director from exercising authority or influence in areas that will affect" the subsidiary. For example, we have approved steps where the recused director is not involved in decisions or discussions regarding the particular subsidiary, financial reports are aggregated so that the subsidiary's performance figures are not separately displayed for the director, and reports to the director are redacted to remove information regarding the subsidiary.

See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996; Review of the Commission's Cable Attribution Rules, 14 FCC Rcd. 19014, 19042 (1999), *reversed and remanded on other grounds, Time Warner Entertainment Co., L.P. v FCC,* 240 F.3d 1126 (D.C. Cir. 2001) (notes omitted).

The Commission has accepted such insulation for directors whose memberships on multiple boards of directors otherwise would cause violations of the FCC's multiple ownership and cross-ownership rules. *See, e.g., Telemundo Group, Inc.*, 10 FCC Rcd. 1104, 1108 (1994) (recusal of an officer or director having interests in two multiple television station owners would be sufficient to eliminate a cognizable interest in one owner, thereby avoiding a violation of the FCC's multiple ownership rules); *Viacom, Inc.*, 9 FCC Rcd. 1577, 1579-80 (1994) (two prospective members of merged Viacom/Paramount board of directors who also served as directors of outside companies were required to recuse themselves from matters concerning certain cable and television interests to prevent violation of broadcast television/cable crossownership rule). Consistent with this established precedent, the insulation of Dr. Malone from decisions regarding LCPR's operations will address any potential concerns arising from the small horizontal overlap (permitted by the Commission)[16] in central Puerto Rico. As noted above, the Commission alternatively could require DIRECTV

[16] The Commission does not restrict cable television/DBS crossownership. *See Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd. 11331 (2002), at ¶140.

to insulate Dr. Malone from the activities of DIRECTV Latin America that relate to Puerto Rico.

IX. The Proposed Transaction Will Benefit Both Competition and Consumers.

With characteristic hyperbole, EchoStar asserts that the "Applicants fail to substantiate a single public interest benefit" resulting from the transaction. EchoStar Petition at 31. However, the Applicants demonstrated that the proposed transaction will benefit both competition and consumers. Such benefits are neither "alleged" nor "ill-defined," but rather concrete and transaction-specific.

There is no question that grant of the Transfer Application will result in a decrease in media consolidation through divestiture of: (a) News Corp.'s ownership interest in DIRECTV; and (b) Liberty Media's ownership interest in News Corp. It also will eliminate the vertical integration between DIRECTV and News Corp.'s "must-have" broadcast and regional sports network programming services. *See* Transfer Application at 16-19. EchoStar ignores well-established Commission precedent in arguing that such benefits "have no logical nexus to consumer welfare." *See* EchoStar Petition at 32.

In addition, the transaction will make Liberty Media's experience and expertise in interactive commerce and other technologies more readily available to DIRECTV. Even EchoStar was forced to acknowledge in its petition that Liberty Media has a long history of creating and developing new programming services, such as RSNs and other offerings. Liberty Media's leadership in the areas of video programming services, interactive commerce and advanced distribution technologies will complement DIRECTV's video offerings and state-of-the-art technological features and will benefit DIRECTV's subscribers. As the Commission has stated many times, the deployment of advanced video services is a recognized public interest benefit. *See Adelphia Approval Order* at ¶256 (citations omitted).

CONCLUSION

After conducting an exhaustive review of the voluminous record and reviewing the arguments and concerns of numerous parties, the Commission approved News Corp.'s acquisition of *de facto* control of DIRECTV and imposed conditions upon News Corp. to ensure that the transaction was in the public interest. Although Liberty Media does not have News Corp.'s broadcast stations, broadcast network or "must have" programming assets, it has agreed (if it acquires News Corp.'s interest in DIRECTV) to the same conditions as are applicable to News Corp. and effectively to the extension of those conditions three years beyond their original expiration. No participant in this proceeding has presented any factual data or empirical analysis justifying any additional or different conditions. The Commission should not countenance efforts to transform a straightforward license transfer application proceeding into a regulatory shopping excursion for self-interested "relief." Liberty Media respectfully requests that the Commission expeditiously approve the Transfer Application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of April, 2007, a copy of the foregoing Consolidated Opposition to Petitions to Deny and Response to Comments was served upon the following by first-class mail, unless otherwise noted:

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